Supreme Court, U.S.
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No. 90-1492

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

JAMES A. COLLINS,
DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Petitioner

v.

RANDY DALE MAYO,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Should this Court grant certiorari to review issues, none of which were timely raised in the courts below, and some of which have never been presented previously?

II. May Petitioner avoid its conceded waiver of a procedural default defense by arguing that an objection is a necessary component of a capital defendant's Eighth Amendment claim under Penry v. Lynaugh, 492 U.S. 302 (1989), especially where such a claim is addressed on appeal by a review of the evidence in the trial record?

III. May the state consistent with this Court's long line of Eighth Amendment precedents preclude the sentencer in a capital case from considering any mitigating evidence, including evidence of character, youth, troubled family history, abuse, etc., unless it provides a direct causal explanation for why the crime was committed?

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I.

STATEMENT OF THE CASE

A. Statement of Facts

At the sentencing phase of his capital trial, Respondent Randall Dale Mayo presented significant evidence in mitigation of a death sentence. The United States Court of Appeals for the Fifth Circuit succinctly described Mr. Mayo's evidence:

> Mayo's counsel presented eight witnesses at the sentencing phase. Patsy Mayo, [Randy's] mother, and Raymond Allison, a friend of the family who had employed Randy and R.T. "Buddy" Mayo, Randy's father, each testified to the traumatic circumstances of Randy's upbringing. Patsy Mayo testified that her husband began beating Randy when Randy was four or five years old, that Randy suffered several unexplained broken bones, that Buddy made numerous death threats to her and the children, that Buddy's physical and verbal abuse of Randy was continuous, and that at the time of the sentencing phase Buddy was in prison for having raped a child. Allison also testified that Buddy Mayo had verbally and physically abused Randy, that all of the Mayo children had been removed from their home for several months after Randy's brother reported to school with signs of physical abuse, and that Randy's subsequent criminal acts were probably the result of his home environment. Allison and other witnesses testified to good works performed by Mayo, his religious faith, and his artistic ability and interest.

Mayo v. Lynaugh, 893 F.2d 683, 688 (5th Cir. 1990).

The trial record is replete with accounts of the physical and emotional abuse Randy suffered at the hands of his alcoholic father, R. T. "Buddy" Mayo. Randy's mother Patsy testified that throughout his childhood Randy was repeatedly abused. R. Vol. XX at 993. On one occasion, Buddy struck four-year-old Randy and sent him "sailing across the room." Id. at 993, 1007. Although the numerous broken bones have never been explained, Randy was

removed once from Buddy's custody to prevent further abuse. Id. at 1009-1010. Raymond Allison, a friend of the family and employer of both Randy and Buddy, testified that no matter how Randy behaved as a child, Buddy would beat him and abuse him verbally. In fact Buddy severely beat Randy several times at Allison's gas station. Id. at 993, 1006-1007. "At the time," Allison averred, "I was thinking it should be the other way around; somebody should be whipping Buddy instead of Buddy whipping his boy." Id. at 1007-1008.

No one in the family escaped Buddy's drunken fury. He beat Patsy, his wife, "quite often," frequently in front of Randy. Id. at 992-993. Repeatedly he threatened to kill Randy and his family, brandishing "guns, knives, and axes, whatever he could get a hold of, whatever he had at the moment." Id. at 993-995, 1009. Randy was forever castigated as a child, told by his tyrannical father he was worthless, no good, that he would never amount to anything. Id. at 994. Even in public, Buddy would curse at Randy and make a scene. Id. at 1006, 1010. Buddy is now in prison, convicted of raping his stepdaughter. Id. at 992.[1]

The effect of this upbringing was not lost on Mr. Mayo's mitigation witnesses. Mr. Allison urged the jury to give Mr.

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[1] At least some witnesses testified that Randy's mother Patsy did little to alleviate the situation and was herself a negative influence upon Randy. Id. at 1005, 1007, 1011 (testimony of Raymond Allison); id. at 1020 (testimony of Raymond's son Kelly Allison) (mother was a bitter and vengeful woman).

Mayo a life sentence because his actions as an adult were attributable to his abused background and his upbringing: "You're the product of the environment that you're brought up in, and if that boy would have had a chance, he wouldn't be here in the courtroom today being tried." Id. at 1008, 1012. Mr. Mayo's background caused him to become "a disturbed and mixed-up young man." Id. Allison testified that Randy could benefit society, and that his life was worth saving. Id. at 1013.

Despite his tragic childhood, Mr. Mayo was a kind and considerate man. Russell Shuey, a friend of the family, testified that in his hometown of Abernathy, Texas, Mr. Mayo helped and served others without seeking remuneration. Id. at 957. Shuey recalled in particular Mr. Mayo's kindness to an elderly couple, Gladys and Ernest Dennis: "He would work on their pickup and their lawnmower, and they would offer him money, but he would never accept it." Id. Mr. Shuey testified he and Randy got along very well. Id. at 963. Raymond Allison similarly testified to Randy's kindness and caring: "He held kids, and he helped them, you know, babysitting, keeping his sisters and them." Id. at 1012. Randy would often clean Allison's yards as well. Id. at 1011.

Mr. Mayo is a religious, artistic man. Raymond Allison attested to Mr. Mayo's faith in God and his religious devotion, observing that he and Mayo attended church services together. Id. at 1011-1012. Kelly Allison also testified about Mr. Mayo's religious faith and devotion. Id. at 1020. Mr. Mayo presented

evidence to the jury about his artistic skills, demonstrating his ability to draw and paint with various media. Id. at 996. In support of this testimony he introduced five drawings, including drawings of his sisters. Id. at 997-1002.

Finally, Mr. Mayo was a diligent and conscientious worker. J.C. Harrell, a former employer, testified Mr. Mayo was fair in his business dealings with him and that Mr. Mayo would always do his best at anything he undertook. Id. at 962. Raymond Allison testified Mr. Mayo was reliable and productive, even as a teenager. Id. at 1011. Given his work record, Allison believed Mr. Mayo would benefit society if he could learn and practice a trade. Id. at 1012.

In his closing argument, defense counsel relied upon this mitigating evidence and urged the jury to vote for a sentence less than death. He reminded the jury of Mr. Mayo's pathetic background, and the redeeming characteristics testified to by his family and friends, all of which counseled against execution. R. Vol. XXI at 1041-1088. Asking the jury to consider Mr. Mayo under a "higher law," he argued that Mr. Mayo's background and character justified a life sentence as a morally appropriate response despite the crime. Id. at 1055, 1057, 1069-71. Because he was merely twenty-four years old at the time of the offense, had come from an abused and troubled background, and had only become like the negative role models who surrounded him as a child, he deserved leniency. Id. at 1050-1056. In addition, defense counsel argued that Randy's artwork weighed in favor of a

life sentence because it demonstrated compassion, sensitivity, love, and talent -- positive human qualities which should not be completely eradicated. Based on the totality of this mitigating evidence, he implored the jurors to see that a life sentence would be the best way to preserve his goodness while at the same time respond appropriately to any of his bad qualities. Id. at 1069-1071.

In response, the prosecutor acknowledged the mitigating quality of Mr. Mayo's evidence, conceding that Mayo "has deep-rooted, deep-seated problems, personality problems" which "didn't happen overnight." Id. at 1084. Recognizing its implications under the narrow focus of the Texas special issues, however, the prosecutor argued that Mr. Mayo's undeniably mitigating evidence required an affirmative answer to the second special issue because Mr. Mayo's problems would "stay there for a long time unless we do something about it." Id. Moreover, the prosecutor argued that Mr. Mayo's artwork was either irrelevant to the special issues, or evidence in aggravation under the special issues. Id. at 1075.[2]

Upon conclusion of the sentencing hearing, in accordance with Tex. Code Crim. Pro. Ann. Art. 37.071(b), the court submitted two "special issues" to the jury: (1) "[W]hether the conduct of the defendant that caused the death of the deceased

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[2] The prosecutor argued that Mr. Mayo's art warranted imposition of the death penalty because it indicated an unhealthy attitude toward women and a potential for future violent conduct. Id.

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was committed deliberately and with the reasonable expectation that the death of the deceased or another would result (Art. 37.071(b)(1)); and, (2) "[W]hether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society (Art. 37.071(b)(2)). The jury was not instructed that it could consider and give effect to Mr. Mayo's mitigating evidence by declining to impose the death penalty. On January 31, 1985, the jury answered "yes" to both "special issues" and the court, as required by statute, sentenced Mr. Mayo to die. R. Vol. XXI at 1094, 1098.

B. Course of Proceedings Below

On April 30, 1986, the Texas Court of Criminal Appeals affirmed Mr. Mayo's conviction and sentence. Mayo v. State, 708 S.W.2d 854 (Tex. Cr. App. 1986). After seeking post-conviction relief in state court, Mr. Mayo filed a Petition for Writ of Habeas Corpus in the United States District Court for the Northern District of Texas. Mr. Mayo raised numerous claims, including the claim that his death sentence violated the Eighth and Fourteenth Amendments because the Texas special issues precluded the jury from considering and giving effect to all of his mitigating evidence. The district court denied Mr. Mayo's Petition February 1, 1989.

The United States Court of Appeals for the Fifth Circuit reversed, holding that Penry v. Lynaugh, 492 U.S. 302 (1989), was directly on point and controlled Mr. Mayo's Eighth Amendment claim under Penry. Mayo v. Lynaugh, 893 F.2d 683 (5th Cir.

1990); App. B. The Court held that Mr. Mayo's mitigating evidence of childhood abuse and trauma was legally and factually indistinguishable from the evidence in Penry. As a result, just as in Penry, the special issues precluded the jury from giving full mitigating effect to Mr. Mayo's mitigating evidence of child abuse:

> [A]s in Penry, Mayo's "history of abuse [was] a two-edged sword": the prosecution converted Mayo's "deep-rooted, deep-seated problems" into evidence of future dangerousness that "would stay there for a long time unless we do something about" them. The prosecutor's closing successfully focused the jury's attention on the exclusive relationship between the evidence presented at the guilt-innocence and sentencing phases and the special issues, but the special issues did not afford sufficient opportunity for consideration of the mitigating evidence Mayo offered. As in Penry, the special issues submitted to the jury "did not provide a vehicle for the jury to give effect to [Mayo's] evidence of . . . child abuse."

Mayo, 893 F.2d at 688, as modified by Mayo, 920 F.2d at 252 (citations omitted); App. B at 11-12; App. A at 2.

On rehearing, the Fifth Circuit held that Mr. Mayo's claim was properly before the court on the merits because the State had waived any reliance on procedural default by failing to raise the defense in the district court below. Mayo, 893 F.2d at 686-687; App. B at 5-9.[3] The Court also rejected Petitioner's argument that a Penry claim, like a Batson claim, requires an objection at trial as a necessary element of the claim itself. Id. at 689-690; App. B at 14-15.

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[3] Petitioner concedes its failure to raise default in the district court. See Petition for Writ of Certiorari at 11 n.3.

II.

SUMMARY OF ARGUMENT

In the lower courts, Petitioner did not timely and properly raise the questions he now proffers for review. Question 1 was withheld until rehearing below, and in its present form is not even the same claim raised on rehearing. Question 2 was withheld until appeal, and later conceded.

Contrary to Petitioner's assertions, an objection is not an element of a Penry claim. Unlike a claim under Batson v. Kentucky, a Penry claim is properly addressed by a review of the evidence in the trial record without reference to the prosecutor's motivation or any other fact requiring elucidation at trial. Moreover, Mr. Mayo complied with the objection "test" now being proposed by Petitioner. Mr. Mayo's evidence was offered for its mitigating value outside the narrow scope of the Texas special issues. Mr. Mayo's evidence was mitigating as a matter of law, and he was not required to relate his mitigating evidence to the offense. Nevertheless, even if Mr. Mayo were required to establish a nexus between his evidence and the offense, the facts establish that he clearly made such a showing. The Petition should be denied.

III.

REASONS WHY THE PETITION SHOULD NOT BE GRANTED

A. BECAUSE PETITIONER DID NOT PROPERLY PRESERVE HIS CLAIMS IN THE COURTS BELOW, THEY ARE NOT BEFORE THIS COURT

Petitioner makes two arguments to this Court: (1) the lower

court should not have reached the merits of Mr. Mayo's Penry claim because at trial Mr. Mayo did not object or proffer his evidence as outside the scope of the special issues; and (2) there was no Eighth Amendment violation because Mr. Mayo did not establish a nexus between his child abuse evidence and the offense. These arguments do not warrant this Court's attention because neither were properly presented below. Indeed, the latter contention was raised for the first time on appeal and then arguably conceded by Petitioner, while the former was raised for the first time on rehearing below.

In the United States District Court, Petitioner's only defense to Mr. Mayo's Penry claim was that the mitigating evidence presented could be fully considered under the Texas special issues. Hearing on Leave to Amend Petition at 7-9; R. 289-303. On appeal, Petitioner maintained this position, but also alleged for the first time that evidence is "mitigating" only if there is a nexus between the evidence and the offense. Brief of Appellee at 38-43. On rehearing in the Fifth Circuit, however, Petitioner raised a new issue, asserting for the first time that Mr. Mayo's claim was procedurally barred because he failed to object at trial. Appellee's Petition for Rehearing at 10-12. Petitioner also argued for the first time that a Penry claim, like a claim under Batson v. Kentucky, 476 U.S. 79 (1986), requires an objection as part of the claim. Id. That argument also failed. App. B at 14-15.

In its petition to this Court, Petitioner argues that a

Penry claim called upon Mr. Mayo to proffer his evidence for its mitigating value outside the scope of the special issues. In addition, Petitioner argues that the Eighth Amendment requires a nexus between Mr. Mayo's child abuse evidence and the crime.[4]

Petitioner cannot present to this Court arguments withheld from the courts below. Delta Airlines, Inc. v. August, 450 U.S. 346, 362 (1981); Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970); see also McCleskey v. Zant, 498 U.S. ___ (1991); Estelle v. Smith, 451 U.S. 454, 468 n.12 (1981) (State waives issues not timely raised in federal district court). Yet Petitioner's nexus argument was untimely raised and then arguably conceded below, and the preservation argument presented here is distinct from the argument presented on rehearing below.[5] Prudential Savings & Loan Association v. Flanigan, 478 U.S. 1311 (1986)(Rehnquist, J., in chambers)(Supreme Court will not address issues initially presented on rehearing below); Radio Station

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[4] In fact Petitioner previously conceded a contradictory position. In its Suggestion For Rehearing En Banc, Petitioner noted that Mr. Mayo's history of abuse "arguably calls for the same result as similar evidence did in Penry's case." Suggestion for Rehearing En Banc at 10. Petitioner suggested that the court rehear the case solely "to differentiate between the types of evidence Mayo offered, i.e., that which was mitigating and that which was not." Suggestion for Rehearing En Banc at 10-11.

[5] On rehearing Petitioner's argument only analogized to Batson and argued that Penry claims were similar and therefore required trial preservation as a part of the substantive claim itself. Now Petitioner adds that the constitution requires Mr. Mayo to have proffered his mitigating evidence outside the scope of the special issues in order to warrant review on the merits on appeal. This argument was never made previously.

WOW, Inc. v. Johnson, 326 U.S. 120, 128 (1945).[6]

The "decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits of one or more of the questions presented in the petition." Canton v. Harris, 489 U.S. 378, 384 (1989); St. Louis v. Paprotnik, 485 U.S. 112, 120 (1988); Oklahoma City v. Tuttle, 471 U.S. 808, 816 (1985). Each of Petitioner's claims "is distinctly an afterthought." United States v. DuPont DeNemours & Co., 366 U.S. 316, 333 (1961). Because this Court's certiorari jurisdiction is limited, and because Petitioner did not properly raise the issues in the courts below, certiorari should be denied.

B. THIS COURT HAS ALREADY REJECTED ANY NOTION THAT MITIGATING EVIDENCE MUST DIMINISH CULPABILITY FOR THE OFFENSE, BUT, IN ANY EVENT, MR. MAYO ESTABLISHED AT TRIAL A NEXUS BETWEEN HIS MITIGATING EVIDENCE AND THE CRIME.

Even if Petitioner had properly presented and not conceded its nexus argument in the courts below, it would still be unworthy of this Court's attention. The argument ignores settled precedent and misrepresents the facts of this case.

In an uninterrupted line of authority, this Court has held that the Eighth Amendment mandates a broad conception of mitigating evidence. See, e.g., Woodson v. North Carolina, 428

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[6] In fact these issues were not properly before the court of appeals, providing additional reasons why this Court should not entertain certiorari jurisdiction here. Terrell v. Morris, 493 U.S. 1 (1989)(per curiam) (court of appeals restricted to reviewing actual judgment of the district court); United States v. Marcello, 876 F.2d 1147, 1153 (5th Cir. 1989) (in habeas, court of appeals limited to reviewing issues presented to district judge).

U.S. 280 (1976). See also Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976); Roberts (Harry) v. Louisiana, 431 U.S. 633 (1977); Lockett v. Ohio, 438 U.S. 536 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982); Skipper v. South Carolina, 476 U.S. 1 (1986); Sumner v. Shuman, 483 U.S. 66 (1987); McCleskey v. Kemp, 481 U.S. 279 (1987); Hitchcock v. Dugger, 481 U.S. 393 (1987); Franklin v. Lynaugh, 487 U.S. 164 (1988); Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934 (1989); McKoy v. North Carolina, 494 U.S. ___, (U.S. Sup. Ct., March 5, 1990).

While the circumstances of an offense are plainly relevant to whether aggravating and mitigating circumstances exist, the circumstances of the offense, and how a person's background, mental condition, and unique frailties contributed to its commission, are not the only circumstances which inform sentencers with respect to the proper punishment. For example, in Skipper v. South Carolina, 106 S.Ct. 1669 (1986), the trial judge excluded as "irrelevant" the defendant's proffered evidence that he would make a good adjustment to prison. The Supreme Court reversed, recognizing that, even though the proffered evidence had absolutely nothing to do with the reason for the crime, and certainly did not relate to culpability, nevertheless the evidence was relevant to capital sentencing:

> Although it is true that [prison adjustment] ... would not relate specifically to petitioner's culpability for the crime he committed, see Koon I, supra, 278 S.C., at 536, 298 S.E.2d, at 774, there is no question but that such [evidence] ... would be "mitigating" in the sense that [it] might serve "as a basis for a sentence less than death." Lockett, supra, 438 U.S. at 604, 98 S.Ct. at 2965.

Id. at 1671. Skipper squarely forecloses Petitioner's argument.

For these reasons, jury instructions must "allow for consideration of mitigating evidence not associated with the crime itself," Boyde v. California, 110 S.Ct. 1190, 1199 (1990), and must leave it "improbable that jurors would arrive at an interpretation [of the instructions] that precludes consideration of non-crime-related evidence." Id.[7] See also South Carolina v. Gathers, 109 S.Ct. 2207, 2214 (1989) (O'Connor, J., dissenting on other grounds)("Evidence extraneous to the crime itself is deemed relevant and indeed, constitutionally so....") Thus, the testimony regarding Mr. Mayo's character and background, even if it were not directly relevant to the crime, "was relevant to the jury's assessment of the defendant and his moral blameworthiness." Id.

Relevant capital sentencing evidence is any evidence that would counsel in favor of a sentence less than death, Eddings v. Oklahoma, 102 S.Ct. 869, 879 (1982) (O'Connor, J., concurring), whether that evidence is "relevant to either the particular offender or the particular offense." Roberts v. Louisiana, 97 S.Ct. 1983 1995 (1977)(emphasis added). See also Zant v. Stephens, 103 S.Ct. 2733, 2744 (1983) ("What is important at the selection stage is an individualized determination on the basis of (1) a character of the individual and (2) the circumstances of

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[7] Thus Petitioner's reliance on Boyde v. California, 108 L.Ed.2d 316 (1990), is perplexing, given that in Boyde this Court upheld the California statute in question precisely because it did not "preclude[] consideration of all non-crime-related evidence." Id. at 331 (emphasis supplied).

the crime."); Eddings, 102 S.Ct. at 877 (to be relevant, mitigating evidence need "not suggest an absence of responsibility for the crime of murder, deliberately committed"); Lockett v. Ohio, 98 S.Ct. 2954, 2965 (1978) (instructions cannot prevent sentencers "giving independent mitigating weight to [1.] aspects of the defendant's character and record and [2.] to the circumstances of the offense.")(emphasis added).[8]

Moreover, even if a nexus were necessary, and it is not, Mr. Mayo would still prevail since he established at trial a nexus between his mitigating evidence and the crime for which he was convicted. Raymond Allison, for instance, explained that Randy's actions were attributable to his tragic background: "You're the product of the environment that you're brought up in, and if that boy would have had a chance, he wouldn't be here in the courtroom today being tried." R. Vol. XX at 1008, 1012. Defense counsel likewise argued that Mr. Mayo's actions were the product of the violence he had been taught as a child: "[W]e eventually sometimes develop into those same adult role models that our parents were for us or the other adults in our lives were for us.

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[8] Petitioner's position is also internally inconsistent, contradicting Jurek v. Texas, 428 U.S. 262 (1976), which is the basis for any claim that Mr. Mayo's sentence is constitutional. Petitioner's suggestion that capital sentencing evidence must be limited "by its relevance to the defendant's personal culpability for the offense" is contradicted by the very capital statute it argues in support of. Under the Texas statute, the second special issue on "future dangerousness" requires the jury to assess moral culpability and sentence upon possible future acts which, by definition, can have no nexus to an offense which has already occurred. Petitioner's argument thus proves too much, indicating that the Texas special issues are unconstitutional per se.

I submit to you, based on Randy's childhood, his upbringing, he never had that chance, never had that role model, never had that opportunity." R. Vol. XXI at 1053.

Even the prosecutor conceded that the offense was attributable to Mr. Mayo's abused background, acknowledging that Randy "has deep-rooted, deep-seated problems, personality problems" which "didn't happen overnight." R. Vol. XXI at 1084. Petitioner cannot assume an opposite stance now. Mr. Mayo clearly established a nexus between his mitigating evidence and the crime, and Petitioner's claim fails simply as a matter of fact.

C. A PENRY CLAIM IS FULLY REVIEWABLE FROM THE EVIDENCE IN THE TRIAL RECORD, SO THAT AN OBJECTION IS NOT A COMPONENT OF SUCH A CLAIM; EVEN IF IT WERE, MR. MAYO'S EVIDENCE WAS OFFERED AND ARGUED FOR ITS FULL MITIGATING VALUE, THUS SATISFYING PETITIONER'S PROPOSED TEST

Petitioner insists that a necessary component of a Penry claim is a special proffer at trial which explains the manner in which mitigating evidence is outside the scope of the special issues. Petitioner raises this contention to avoid the consequences of its own failure to raise the affirmative defense of procedural default in the district court below. Before Penry was decided, Petitioner conceded that Mr. Mayo's claim should be litigated on the merits. Pet. at 11 n.3; Mayo v. Lynaugh, 893 F.2d at 686-687.

After this Court decided Penry, Petitioner belatedly attempted to recover from its earlier waiver of the trial default by arguing that an objection is a necessary component of a Penry

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claim. Appellee's Petition for Rehearing at 10-12. When that argument failed, Petitioner recast its claim in a new form, arguing for the first time in this Court that Mr. Mayo should have made a particular proffer at the time of trial, and that his failure to do so is fatal to the Penry claim.

Even if Petitioner were not foreclosed from raising this complaint at so late a stage in the proceedings, it still could not prevail, since a special proffer is manifestly not an "element" of the Penry claim. Presumably, Petitioner would have the accused announce that he has offered, or is about to offer, mitigating evidence which is outside the scope of the special issues, and thus the special issues do not allow for the consideration of his evidence. This, however, is precisely what the accused accomplishes by lodging an objection at trial. Petitioner's argument, therefore, is merely another way to assert its position that an objection is part of the substantive Penry claim. This, in turn, is a transparent attempt to overcome its failure to assert the affirmative defense of procedural default in the district court.

The issue raised by Penry is merely whether particular evidence can be given mitigating effect within the restrictive scope of the special issues. To make this determination, a reviewing court need only assay the evidence and determine whether its mitigating quality falls outside the range of the special issues, precisely the inquiry this Court undertook in Penry. Like a claim under Beck v. Alabama, 447 U.S. 625 (1980),

for instance, the question is merely whether the court's charge allowed the jury to exercise its constitutionally required options. Beck does not contemplate a fact-specific proffer before the trial court, nor does it require a particular showing by the accused of how the evidence justifies an instruction on the lesser included offense. On the contrary, the evidence either merits an additional instruction, or it does not -- a determination comfortably within the reach of an appellate court, even without a particular proffer at trial.

Petitioner intimates that Batson v. Kentucky, 476 U.S. 79 (1986) supports his contention. Pet. at 13. Cf. Jones v. Butler, 864 F.2d 348 (5th Cir. 1989)(objection is a necessary part of a Batson claim). Batson, however, provides a procedure for proving a Fourteenth Amendment violation, and does not create a new constitutional claim: "Batson did not change the nature of the violation recognized in Swain, but merely the quantum of proof necessary to substantiate a particular claim." Ford v. Georgia, 498 U.S. ___, 112 L.Ed.2d 935, 947 (1991). The procedure created by Batson necessarily must be initiated at the moment of the alleged violation, since a Swain violation turns on the intent of the prosecutor, and contemporaneous evidence best measures that intent. As the Fifth Circuit noted in Jones, the trial judge must rely on her "observations of the demeanor of the prosecutor and the veniremen," since the finding of intentional discrimination in the use of peremptory challenges is "a finding of fact that 'largely will turn on evaluation of credibility.'"

Id. at 370, (citing Batson, 476 U.S. at 98 n. 21). Further, "any prosecutorial misconduct is easily remedied before trial simply by seating the wrongfully struck venireman." Id.

Penry, unlike Batson, does not provide a procedural mechanism, but reaffirms the established Eighth Amendment right to full jury consideration of all mitigating evidence. The constitutional violation identified in Penry does not turn on the "intent" of any actor in the trial process, but instead on the jury's inability to give full mitigating effect to particular evidence within the confines of the Texas special issue questions. As the Court below recognized, a Penry claim "does not require a contemporary explanation by the prosecution or a fact-laden evaluation of pre-trial conduct, but instead focuses on the mitigating evidence presented, the conduct of the sentencing phase, and the instructions provided the jury pursuant to the Texas capital sentencing statute." Mayo, 893 F.2d at 689-690.

Moreover, Petitioner's argument in favor of a contemporaneous objection as an element of a Penry claim is flawed because it proves too much. The rationale, if accepted, would extend to every other claim of prejudicial error. The State's interest in orderly appellate review is vindicated by regular and consistent application of procedural default rules; if an objection is required as a part of a Penry claim, then it would be required as part of any other conceivable claim of a deprivation of constitutional rights. This "requirement" would

relieve the State of its obligation to assert affirmative defenses in a timely fashion -- an obligation recognized by this Court. See Estelle v. Smith, 451 U.S. at 468 n. 12; Beck v. Alabama, 447 U.S. at 630 n. 6. It would also deny review to defendants even when they could establish adequate cause for failing to object and demonstrate prejudice suffered thereby. See Harris v. Reed, 489 U.S. ___, 103 L.Ed.2d 308 (1989); Engle v. Isaac, 456 U.S. 107 (1982); Wainwright v. Sykes, 433 U.S. 72 (1977); Hargrave v. Dugger, 832 F.2d at 1532-1533 (petitioner established "cause and prejudice" for his procedural default and therefore entitled to relief under Lockett and Hitchcock). Petitioner's proposed "requirement," therefore, cannot be reconciled with applicable precedent from this Court.[9]

Even were Petitioner's claim legally viable, Mr. Mayo would still be entitled to relief since he proffered his evidence outside the scope of the special issues. Petitioner's numerous allegations to the contrary (Pet. at 9, 11-13, 15) simply

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[9] In fact, this Court has by implication already rejected Petitioner's contention. Hitchcock v. Dugger, 481 U.S. 393 (1987). Like Mr. Mayo, Hitchcock raised the issue in habeas corpus proceedings that his evidence could not be given full mitigating effect by the jury. Like Mr. Mayo, Hitchcock did not object at trial. The Florida Supreme Court ignored the trial default, however, and this Court considered his claim on the merits, never even suggesting that Hitchcock's Lockett-based claim required a trial objection as a part of the claim itself. See Hargrave v. Dugger, 832 F.2d 1528, 1536-1537 (11th Cir. 1987) (en banc) (Tjoflat, J., concurring) (discussing procedural posture of Hitchcock's Lockett claim).

misrepresent the record below.[10]

For example, Patsy Mayo testified about her son's history as a victim of his father's drunken abuse, specifically explaining that her purpose in testifying was to seek a life sentence. R. Vol. XX at 996. She pleaded with the jury to spare her son, that because of his background he needed help. Id. at 1001. She thus disclaimed any notion that she was trying to show only that Randy was non-violent. Raymond Allison also testified about Mr. Mayo's history of abuse, observing that Mr. Mayo was a mixed-up young man who should be given life because his life was worth saving -- not because he was non-violent. Id. at 1008, 1012, 1013. Mr. Mayo introduced evidence of his artistic ability to show, as an independent mitigating matter, that he possessed "a positive talent," not to show a lack of future dangerousness, a fact even conceded by Petitioner. Pet. at 12 n.5.

Counsel for Mr. Mayo likewise implored the jury to consider all of his client's mitigating evidence and to give life, not because the evidence showed a lack of violence, but because it independently showed that Mr. Mayo deserved to live: "I'm asking that you do not put Randy Dale Mayo to death, at his young age,

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[10] Petitioner claims that the "entire thrust" of Mr. Mayo's evidence was to show non-violence. Pet. at 21. In support of this claim, it selectively cites portions of the record where Mr. Mayo presented evidence relevant to the second special issue. Petitioner, however, omits citation to the testimony of Patsy Mayo, Raymond and Kelly Allison, and Russell Shuey, who specifically testified about topics unrelated to (or relevant beyond the scope of) the second special issue, including his kindness to others, his religious faith, his compassion, and his artistic talent.

his background. Consider those factors. Give him an opportunity." R. Vol. XXI at 1050-1056. Counsel also invoked "the higher law" in asking the jury to give Mr. Mayo life. Id. at 1069-1071. Counsel pleaded for mercy. Id. at 1055.

In fact, the very nature of Mr. Mayo's evidence shows that it was offered for its full mitigating value, independent of its tendency to establish a propensity for or against violence. To a rational juror, Mr. Mayo's evidence of child abuse, good works, diligence, artistic ability, religious faith, and youth all had "clear relevance to his character other than to demonstrate his ability to live in a highly structured prison environment," relevance which reasonable jurors clearly would have grasped. Penry, 106 L.Ed.2d at 280. Also, because Mr. Mayo's child abuse was "double-edged" and indicated that he would be violent in the future, Petitioner cannot claim that this evidence was proffered to show non-violence.[11]

Exactly as in Penry, Mr. Mayo "offered [his] mitigating evidence . . . as the basis for a sentence of life imprisonment rather than death." Id., 106 L.Ed.2d at 279. As properly recognized by the Fifth Circuit, Petitioner has waived any claim of procedural default, Mr. Mayo was not required to object or make a particular proffer at trial, and he is therefore entitled to relief under the Eighth Amendment. Petitioner's untimely

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[11] The mitigating value of this evidence lay not in the fact that it rebutted a showing that Mr. Mayo might be violent, but rather that it explained that the source of such likely violence was beyond Mr. Mayo's control.

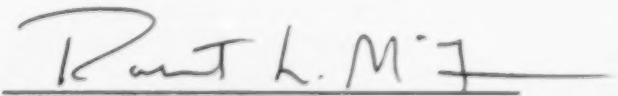
argument is factually and legally untenable, and does not merit this Court's consideration. Sup. Ct. R. 10.

IV.

CONCLUSION

The Fifth Circuit has considered this case no fewer than four times. Mayo v. Lynaugh, 882 F.2d 134 (5th Cir. 1989); Mayo v. Lynaugh, 883 F.2d 358 (5th Cir. 1989); Mayo v. Lynaugh, 893 F.2d 683 (5th Cir. 1990); Mayo v. Collins, 920 F.2d 251 (5th Cir. 1990). Though Petitioner's arguments change with time, they do not improve. In its Petition for Writ of Certiorari, Petitioner recasts its arguments yet again and seeks to invoke this Court's jurisdiction merely to secure another review of its claims. "[T]his Court is not a forum for the correction of errors." Boag v. MacDougall, 454 U.S. 364, 368 (1982)(Rehnquist, J., dissenting), and Petitioner cannot advance a compelling reason why this Court should devote scarce judicial resources to revisit the same facts and law considered in Penry. Accordingly, this Court should deny the Petition for Writ of Certiorari.

Respectfully Submitted,



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No. 90-1492

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

JAMES A. COLLINS,
DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION
Petitioner

v.

RANDY DALE MAYO,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CERTIFICATE OF SERVICE

I, Robert McGlasson, a member of the Bar of this Court, hereby certify that all parties required to be served have been served, and that a copy of Mr. Mayo's Brief in Opposition to the Petition for Writ of Certiorari in the above-captioned case was mailed, first class postage prepaid, to counsel for Petitioner:

William Zapalac
Attorney General's Office
State of Texas
P. O. Box 12548
Austin, Texas 78711-2548

This 20th day of May, 1991.

Robert L. McGlasson